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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: AUG 0 3 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]
EAC 07 255 52182

IN RE: Petitioner:

Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner, part of a Christian liberal arts college, seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a professor of economics. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO agreed with the director's findings, and dismissed the appeal.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.5(a)(4) states that a motion that does not meet applicable requirements shall be dismissed.

The AAO dismissed the appeal on March 26, 2010. The beneficiary signed Form I-290B, Notice of Appeal or Motion, and filed the motion on April 27, 2010. The beneficiary, however, is not an affected party with standing in this proceeding. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). The regulations at 8 C.F.R. §§ 103.5(a)(1)(i) and (iii)(A) state that only an affected party may file a motion. Because the beneficiary is not an affected party, the AAO cannot accept, and therefore must dismiss, the motion.

In the alternative, the motion would not prevail on its merits. Section 203(b)(2)(A) of the Act makes immigrant visas "available . . . to qualified immigrants who are members of the professions holding advanced degrees . . . and whose services in the sciences, arts, professions, or business are sought by an employer in the United States." Section 203(b)(2)(B)(i) of the Act permits a waiver of the job offer requirement if the government "deems it to be in the national interest."

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The AAO, in its March 26, 2010 decision, discussed the outcome of the petition:

> On February 26, 2009, the director notified the petitioner that the director would deny the petition unless the petitioner submitted evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation.* In response, the petitioner . . . made no effort to establish the beneficiary's eligibility for the waiver. In a new letter, [the petitioner's coordinator of faculty services] Carolyn Sanders stated: "we find that we

checked the wrong box in our original petition," and that the beneficiary "is NOT seeking a National Interest Waiver" (emphasis in original). . . .

The director denied the petition on May 6, 2009, stating the petitioner "failed to submit any of the information we requested." The director found "there is no evidence whatsoever that suggests the beneficiary warrants a waiver of the labor certification requirement in the national interest."

On appeal, the petitioner repeats the claim that "we had checked the wrong box in our original petition" and that the beneficiary "is not seeking a National Interest Waiver." The petitioner indicates that the petitioner had intended to seek to classify the beneficiary as a member of the professions holding an advanced degree, but not with a national interest waiver. . . .

While the petitioner, on appeal, contends that it had applied for the waiver essentially by mistake, the petitioner also attempts to address the guidelines in *Matter of New York State Dept. of Transportation.* The petitioner submits documentation of the beneficiary's participation in professional conferences and other evidence of his continuing work in his field. The petitioner, however, had already forfeited its opportunity to submit evidence in support of the waiver claim.

The director had specifically informed the petitioner of the deficiencies in the record in the February 26, 2009 notice discussed earlier. At that time, the petitioner could have submitted materials to support the waiver claim. Instead, however, the petitioner chose to effectively abandon the waiver claim by asserting that the beneficiary "is NOT seeking a National Interest Waiver." The . . . director informed the petitioner that the petition would be denied without evidence of the beneficiary's eligibility for the waiver, and that the petitioner declined to submit such evidence at that time.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

> Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On motion, the beneficiary states no new facts and submits no affidavits or documentary evidence. Also, the beneficiary does not address any of the procedural issues cited by the AAO. The beneficiary does not establish that the AAO based its 2010 dismissal decision on an incorrect application of law or USCIS policy. Instead, the beneficiary simply argues that he meets the national interest test set forth in *Matter of New York State Dept. of Transportation*. The beneficiary's attempt to make a straight case for eligibility, well after the petitioner abandoned its attempts to do so, would not be a viable basis for a motion to reopen or reconsider even if the petitioner, rather than the beneficiary, had properly filed the motion. The AAO, therefore, would dismiss the motion on this ground if an affected party had filed it.

The AAO will dismiss the motion for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

ORDER: The motion is dismissed.